

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**In re: SUBPOENA FOR INSPECTION
AND SAMPLING OF PREMISES
OWNED BY NON-PARTIES IN THE
MATTER OF:**

**STATE OF OKLAHOMA, et al.
Plaintiffs**

vs.

Case No. 4:05-CV-00329-TCK-SAJ

**TYSON FOODS, INC., et al.,
Defendants.**

**POULTRY GROWERS' MOTION TO RECONSIDER
THE MAY 31, 2006 ORDER REGARDING SUBPOENAS FOR
INSPECTION AND SAMPLING OF PREMISES OWNED BY NON-PARTIES**

I. INTRODUCTION

As this Court is aware, certain non-parties, referring to themselves as Poultry Growers¹ sought this Court's protection from subpoenas served upon them by the Plaintiff in the present action. This Court, in its May 31, 2006 Order (Dkt No. 757), denied the Poultry Growers' *Objection and Motion to Quash Subpoenas for Inspection and Sampling of Premises Owned by Non-Parties and Brief in Support* (Dkt Nos. 493 and 539). Without waiving any right they may have to appeal the Court's decision, the Poultry Growers now ask the Court to reconsider its May 31, 2006 Order, specifically with regard to the issues of relevance and taking.

¹ These non-parties are: Bill R. Anderson; Steve Butler, allegedly d/b/a Green Country Farms; Ren Butler and Georgia Butler; Julie Anderson Chancellor; Roger D. Collins; Franklin A. Glenn and Kenneth D. Glenn and Sondra D. Glenn; Juana Loftin; Larry McGarrah and Priscilla McGarrah; Jim L. Pigeon and Michele R. Pigeon; Joel J. Reed and Rhonda Reed and Caleb Reed and Cory Reed; W. A. Saunders and Bev Saunders; Robert V. Schwabe, II; and David R. Wofford and Robin L. Wofford.

II. RELEVANCE OF THE DISCOVERY REQUESTED BY PLAINTIFF

As the Court will recall, the Poultry Growers suggested in their papers that the discovery sought by Plaintiff is simply not relevant because it is not reasonably calculated to lead to admissible evidence. Please also note that the only evidence before the Court is that which was provided by the Affidavit of Bert Smith, Exhibit II to the Poultry Growers Motion (Dkt. No. 493).

In his Affidavit, Bert Smith testified that the data sought by the State are meaningless without the foundational work of obtaining background data and tracing the alleged contamination from the Illinois River back to the alleged sources. The State did not offer a shred or scintilla of evidence to support the relevance of its fishing expedition upon the properties of the Poultry Growers. The Court observed that “*Plaintiff alleges that the IRW has been polluted and that improper poultry waste disposal practices are responsible for the pollution. Plaintiff notes that poultry waste includes numerous elements including phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial pathogens. Plaintiff also notes that elevated levels of these substances exist in the waters of the IRW.*” (Page 4) The Poultry Growers remind the Court that Plaintiff has only made arguments -- Plaintiff has not submitted a shred or scintilla of evidence to support the arguments upon which the Court has relied to conclude that Plaintiff has adequately satisfied the relevancy requirement for the proposed discovery.

In further support of their suggestion that the State simply has not laid a relevance foundation for the proposed discovery, the Poultry Growers provide a copy of a recent report on the condition of the Illinois River Watershed. See Exhibit 1 to this Motion. The Oklahoma Conservation Commission has just released a long-term water quality study of the Peacheater Creek in Adair County. That study indicates that water quality has improved tremendously over the last six years and is projected to improve even more in the next year. The study also points

out that there are many potential sources of phosphorus and nitrogen, not just poultry growing operations. Plaintiff has not provided even a single datum point to support the relevance of its proposed discovery against only one type of potential source of phosphorus and nitrogen. Neither has the Plaintiff made any effort to trace phosphorus and nitrogen back upstream from the Illinois River to any potential source of such substances. Nor has the Plaintiff provided evidence that any contaminants today exist in the Illinois River in unlawful and excessive amounts.

The Poultry Growers respectfully ask that the Court reconsider its decision and require Plaintiff to make at least a prima facie evidentiary showing of relevance of the discovery Plaintiff seeks to impose upon the non-parties, Poultry Growers.

III. EMINENT DOMAIN OR TAKING BY THE STATE

The Court will also recall that the Poultry Growers asked the Court to require the State to comply with the requirements of eminent domain prior to entry onto the subpoenaed parties' properties. In its May 31, 2006 Order, the Court "... *concludes that the proposed sampling does not constitute a taking by the State.*" (Page 10) This conclusion was apparently based upon the quantities and amounts of samples authorized to be taken.

The Poultry Growers respectfully ask that the Court reconsider this conclusion in light of the Plaintiff's refusal to split soil samples in the field. The net result of the Court's authorizing the soil sampling, by both the State and Defendants, is that the subpoenaed parties are each potentially subjected to not just a total of 240 samples. Instead and if each of the Defendants takes its own soil samples, the subpoenaed parties will be subjected to the taking of over 1,500 soil samples per subpoenaed party. The State's refusal to split soil samples in the field causes this additional taking.

The Poultry Growers respectfully ask that the Court reconsider its conclusion on eminent domain and find that Plaintiff is that State and that the State is “taking” property from each subpoenaed party without just compensation and in violation of the United States and Oklahoma Constitutions.

IV. CONCLUSION

WHEREFORE, these Poultry Growers request that the Court reconsider its May 31, 2006 Order and grant the Poultry Partners Motion to Quash. Alternatively, Poultry Growers request that the Court stay the Plaintiff’s requests to sample the subpoenaed parties’ soil until the State has complied with eminent domain requirements for entry onto the property of these non-parties, Poultry Growers.

Respectfully submitted,

s/ D. Kenyon Williams, Jr.

Michael D. Graves, OBA #3539

D. Kenyon Williams, Jr., OBA #9643

**HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.**

320 South Boston Avenue, Suite 400

Tulsa, OK 74103-3708

Telephone (918) 594-0400

Facsimile (918) 594-0505

ATTORNEYS FOR POULTRY GROWERS

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2006, a copy of the above and foregoing was sent via facsimile to the following counsel of record:

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 N. Classen
Oklahoma City, OK 73118
405-530-8800
Fax: 405-530-8990

William H. Narwold
Motley Rice LLC (Hartford)
20 Church St., 17th Floor
Hartford, CT 06103
860-882-1676
Fax: 860-882-1682

and that an electronic version of the same was sent this date to the following:

Douglas Allen Wilson
Email: Doug_Wilson@riggsabney.com

Elizabeth C Ward
Email: lward@motleyrice.com

Frederick C Baker
Email: fbaker@motleyrice.com

James Randall Miller
Email: rmiller@mkblaw.net

John Trevor Hammons
Email: thammons@oag.state.ok.us

Louis Werner Bullock
Email: lbullock@mkblaw.net

Melvin David Riggs
Email: driggs@riggsabney.com

Richard T Garren
Email: rgarren@riggsabney.com

Robert Allen Nance
Email: rnance@riggsabney.com

Sharon K Weaver
Email: sweaver@riggsabney.com

W A Drew Edmondson
Email: fc_docket@oag.state.ok.us

David Phillip Page
Email: dpage@mkblaw.net

Dorothy Sharon Gentry
Email: sgentry@riggsabney.com

Kelly S Hunter Burch
Email: fc.docket@oag.state.ok.us

s/D. Kenyon Williams, Jr.

D. Kenyon Williams, Jr.